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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND RUDOLPH M. EVANS, *Petitioners*

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

BRIEF FOR THE RESPONDENT IN OPPOSITION

to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

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CITATIONS.

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to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED.

The petitioners' statement of the questions presented is not accurate.

(1) Their statement of the first question is based upon a false premise. It reads:

> "(1) Whether the Board exceeded its statutory authority in imposing a condition of membership 'pursuant' to Section 9 of the Federal Reserve Act."

So stated the question would answer itself; for if we should assume that the Condition was imposed "pursuant to the Federal Reserve Act" it would follow that the Condition is valid, since Section 9 of that Act (12 U.S.C. §321) provides, in part:

> "The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto, may permit the applying bank to become a stockholder of such Federal reserve bank."

Actually, the main question considered and decided adversely to the petitioners by the court below was that which the petitioners here assume, without discussion, to be settled the other way, viz., was the Condition imposed "pursuant to the Federal Reserve Act"? The answer to that question may be found in the language of the Condition, or, if there be doubt as to the meaning of such language as written, then in the factual intent of the Board as shown by the undisputed surrounding circumstances described in this record.

Therefore if this court agrees, as we believe it must, that the language of the Condition is clear on its face and that neither that language nor the factual intent of the Board, as disclosed by the record and found by the court below, affords any basis for the petitioners' bald statement that the Condition was imposed "pursuant to the Act", then, a more accurate statement of the first question presented would be:

(1) Does the Board of Governors of the Federal Reserve System have an "administrative discretion" *beyond* the expressly restricted authority conferred by the Federal Reserve Act, to impose conditions of membership unauthorized by the Act? More specifically, does the Board of Governors have power to require an admittedly qualified and eligible member bank to forfeit its membership, with consequent destruction of its business and loss to all of its stockholders, as well as loss to the whole community of needed banking facilities, merely because of the acquisition of a small minority of its stock by a purchaser, which, without a hearing of any kind, has been proscribed by the Board?

The petitioners' second question is also inaccurate. There is no element of "estoppel" in this case. A more accurate statement of the second question would be:

(2) Assuming that the Board has acted without authority of law in imposing a condition of membership upon an admittedly eligible applicant state bank, is such bank nevertheless bound by such invalid condition if it agreed to it (there being no statutory provision for obtaining Federal Reserve membership by agreement)? Stated more broadly, may an administrative agency of the federal government effectively usurp power, which the Congress has deliberately withheld from it, by refusing to perform its own statutory functions except upon obtaining an unauthorized agreement from a citizen?

The petitioners' third question attacks the jurisdiction of the District Court upon the basis of two false premises: (1) that the Board had "neither acted nor threatened to act under the Condition" and (2) that the respondent had failed "to exhaust its administrative remedy." In view of the clearly supported findings below (1) that the Condition itself, as written, as well as the Board's subsequent resolution respecting it, constituted a continuing threat to the respondent and (2) that the respondent had no administrative remedy, question 3 falls of its own weight.

The petitioners might have added a fourth question, which bears directly upon the immediate problem as to whether this court should grant certiorari:

> (4) May a governmental administrative agency after representing to a court in a judicial proceeding that its action which is under legal test is to be effective only within certain limits, in harmony with procedure prescribed by statute, and after so inducing the entry of a declaratory judgment fairly responsive to such contentions, obtain a review thereof by certiorari in an effort to widen the effective scope of its action?

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations are set out in the Statutory Appendix, *infra,* pp. A-1 to A-11.

ARGUMENT.

FACTUAL BACKGROUND.

The complaint alleged (Pars. V, VII, R. 3-4), the answer necessarily admitted and the court below found (R. 121-122) that the Board of Governors of the Federal Reserve System, acting on the application of the Peoples Bank of Lakewood Village, California, for membership in the system, took into consideration all factors prescribed by statute, found the bank in all ways qualified and eligible for membership and then imposed the following condition (R. 59):

> "4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

It will be noted that the key words in the Condition are: "If * * * Transamerica * * * acquires * * * any interest in such bank * * *." That is all that must happen before the petitioners can invoke a forfeiture at will.

The action was one for a declaratory judgment and the court below has held that the Condition, as it is written, is invalid, but that in the light of (a) concessions of lack of power to prevent a purchase of stock which would be violative of the Condition; (b) a resolution passed by the Board after suit was begun; and (c) the statements of its counsel in argument concerning the circumstances in which the Condition would be invoked and the methods which would be employed in its enforcement; the Condition may be given effect in the event of a change for the worse in some substantial way in the Bank's management policies or practices such as would justify the expulsion of any member bank from the Federal Reserve System, a hearing, however, being required. This declaration of the rights of the parties being in strict accord with the law as well as with the petitioners' own representation of their intent, it is most difficult to see about what they can complain. But they are now urging that they should be permitted to enforce the Condition as written (Petition, pp. 5, 14-15).

The facts surrounding the application by Peoples Bank for membership in the Federal Reserve System are well summarized in the opinion of the Court of Appeals (R. 121-125) and are supported by the record (R. 28-61).

After the Bank was completely ready for business and its application was made, five months elapsed before it received notice of its admission (R. 41, 58). It had no economic alternative but to open its doors

under the shadow of this unprecedented and, as the court below called it, "drastically restrictive" condition. The Bank also had every reason to expect at that time that if it should ever be given notice to withdraw from the Federal Reserve System by the invocation of the Condition, it would be able to obtain Federal deposit insurance by direct application as a non-member state bank (R. 31-32). During all the time the application was pending and in all the discussions and correspondence relating to it, the petitioners and their representatives carefully avoided disclosing to the Bank that they had already agreed with the Federal Deposit Insurance Corporation that the latter would refuse to insure it if it should "withdraw from the Federal Reserve System". That disclosure was first made in a letter from Mr. Eccles to Mr. A. P. Giannini, Chairman of the Board of Transamerica Corporation, on November 13, 1942 (R. 65, 82) and was not made known to the Bank until March 24, 1944, nearly two years after the original imposition of the Condition (R. 32, 107).

The Bank was wholly powerless to prevent its stockholders from selling stock to any person or corporation they saw fit, and they had not even been called upon to restrict their right to do so. No matter how much the Bank might have desired to avoid conflict with the petitioners concerning their anti-Transamerica "policy", the Bank realized for the first time on March 24, 1944, that if this Condition No. 4 meant what it said and was valid, the Bank's very existence might be terminated at any

time at the whim of the petitioners—all because Transamerica Corporation had bought 500 (out of a total of 5,000) of the outstanding shares of the Bank's stock (R. 6, 107). Accordingly, the Bank's Board of Directors promptly authorized the institution of legal proceedings to determine the legal effect of Condition No. 4 (R. 32).

The complaint alleges and the answer necessarily admits that termination of the plaintiff's membership in the Federal Reserve System would cause plaintiff to lose its status as an insured bank (It is expressly so provided by law. See Section 12B of the Federal Reserve Act, as amended, subsection (i)(2); 12 U.S.C. §264 (i)(2); Statutory Appendix, pp. A-6, A-7) and "such loss would render the plaintiff unable lawfully and advantageously to pursue its functions as a bank and to conduct its operations to the advantage of its stockholders and the public served by it under supervision according to law" (R. 5-6).

The documentary evidence annexed to the affidavits submitted by the plaintiff also shows the circumstances in which the petitioners' anti-Transamerica "policy" was developed. No pretense was made that it represented the Congressional intent. No claim was made that the petitioners had any legal right to prevent further investments in bank stock by Transamerica Corporation. Yet we have the bald admission by the petitioners and their representatives that they, in secret meeting with the Comptroller of the Currency and the Chairman of the Board of Directors of the Federal Deposit Insurance Corporation,

and not as a part of any administrative proceeding whatsoever, unanimously agreed that they should, "under existing circumstances, decline permission for the acquisition directly or indirectly of any additional banking offices or any substantial interest therein by Transamerica Corporation, Bank of America N. T. & S. A., or any other unit of the Transamerica group" (R. 69-70), and that the Federal Deposit Insurance Corporation should decline "to insure any newly organized State non-member bank in which Transamerica Corporation has a substantial interest or any bank in the group which may withdraw from the Federal Reserve System" (R. 84). The petitioner Eccles, Mr. Leo T. Crowley, who was then Chairman of the Board of Directors of the Federal Deposit Insurance Corporation, and other spokesmen for the petitioners have admitted time and again in testimony before Congressional committees and in other public records that they do not under existing law possess any power to restrict the expansion of bank holding companies; and the Congress, thoroughly aware of the petitioners' desire for such power, has steadfastly refrained from enacting any legislation designed to confer it[1] (R. 67-68, 96-103).

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[1]This Court may take judicial notice of that which is a matter of public and common knowledge, viz., that the principal defendant, the petitioner Eccles, on almost the same day on which the petition herein was filed, appeared before a committee of the Congress and testified publicly in support of a bill now pending, which was sponsored by him for the express purpose of curbing the expansion of Transamerica Corporation. It is significant that the alleged need for the legislation is predicated by said petitioner (whose testimony was widely reported in newspapers

The imposition of Condition No. 4 was part and parcel of the Board's anti-Transamerica "policy". This is apparent not only from the wording of Condition No. 4, but from the circumstance that the letter from the Board of Governors denying the original Peoples Bank application for membership was written on the same day and signed by the same man as the letter to Transamerica Corporation announcing the adoption of the "policy" of declining permission to Transamerica, to acquire "any substantial interest" in banks (R. 63-64, 69-70). The correspondence annexed to the Andrews affidavit (R. 69-96) shows eloquently on its face the character of the prejudice in which Condition No. 4 and the entire anti-Transamerica "policy" were conceived. Yet all the while, it was conceded by the petitioners that the Congress, —the only body vested with a lawful right to declare such a policy—had turned a deaf ear to the pleas of the petitioners to pass a law authorizing the enforcement of their "policy".

From the foregoing, it is plain that Condition No. 4 was imposed pursuant to the policy of discrimination agreed upon by the Federal bank supervisory agencies and for the purpose of restricting the business of two corporations named in the Condition in the face of the admitted and unquestioned fact that the petitioners were without any authority in law to impose such a restriction.

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throughout the country) upon an assumption of the correctness of the finding in the court below, that Condition No. 4 as written is invalid. (See p. 18, infra, for verbatim quotation from Mr. Eccles' testimony.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. THE CASE PRESENTS NO QUESTION OF IMPORTANCE FROM AN ADMINISTRATIVE VIEWPOINT.

The petitioners state that the case presents *for the first time* an important question concerning the statutory authority of the Board to condition the admission of banks to System membership. The record shows, without dispute, however, that no condition having any similarity to Condition No. 4 has ever been imposed upon any other bank seeking System membership (R. 62-63, 104-106). This means that in the 30 year history of the Federal Reserve System there has been no instance in which the power sought in this case was exercised with respect to any other bank. That fact bears directly upon the question of the importance of review and is a strong indication that the decision of this court is not required from a practical standpoint to resolve any question of either doubtful or important administrative authority.

That the Condition is one of no administrative importance to the petitioners is further shown by their studious attempts throughout this litigation to avoid any decision involving an interpretation of the statute by interposing procedural motions which sought the avoidance of any determination on the merits.

2. THE CASE PRESENTS NO QUESTION OF IMPORTANCE FROM THE VIEWPOINT OF INTERPRETATION OF FEDERAL STATUTES.

(a) The petitioners have admitted lack of authority under existing law to curb extension of bank holding company interests.

A mere reading of the Condition shows that the purpose of the Condition was to prevent one bank or the owners of one group of banks from acquiring any interest in the plaintiff bank, and that this purpose was to be made effective through denying to the plaintiff a continuation of the advantages of memberships in two Federal agencies, namely, the Federal Reserve System and the Federal Deposit Insurance Corporation. The record (R. 96, 97, 100) shows that the petitioners have admitted lack of authority under existing law so to curb such acquisitions. Two brief extracts are repeated here:

From Thirtieth Annual Report of the Board of Governors (Exh. 24, R. 96):

> "* * * the only limitation which the law imposes upon the control of subsidiary banks by bank holding companies is that the latter may not vote their stock in a controlled bank without securing a voting permit from the Board, and it is only as an incident to obtaining the voting permit that there is any regulation at all. * * *"
>
> "There is now no effective control over the expansion of bank holding companies either in banking or in any other field in which they may choose to expand. * * *"

From Eccles' testimony before the Committee on Banking and Currency, April 5, 1943 (Exh. 25, R. 98):

> "Mr. Patman: Do not you have some power and authority to deal with that situation?
> "Mr. Eccles: We do not.
> "Mr. Patman: Have you ever asked for any?
> "Mr. Eccles: No we have not. * * *"

(b) The Board has long understood that its power to impose conditions of membership on state banks was confined to its powers under the Federal Reserve Act.

The sole source of authority in the Board to impose any conditions upon the acquisition by an applicant state bank of stock in a reserve bank is found in the following excerpt from 12 U.S.C. §321 (Section 9 of the Federal Reserve Act, Petition p. 20):

> "* * * The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe *pursuant thereto* may permit the applying bank to become a stockholder in such Federal reserve bank." (Italicized words added by amendment.)

The Congressional intent that the Board should not have authority to roam at large in the prescription of conditions has been made very clear. As §321 was worded prior to amendment in 1927 (McFadden Act), it provided, in broad language, as follows (40 Stat. 233):

> "The Federal Reserve Board, subject to such conditions as it may prescribe, may permit the apply-

ing bank to become a stockholder." (Public Law No. 25, Sixty-fifth Congress, approved June 21, 1917.)

Since the McFadden Act inserted the words "pursuant thereto" in February, 1927, there has been no doubt at all that the Board's power to impose conditions of membership on state banks has been limited to such conditions as would be imposed pursuant to the Federal Reserve Act. Petitioners tacitly admit this (Petition, p. 7, par. (a)). The effect of the McFadden Act so to confine conditions of membership is stated in the Board's official report to the Congress of the United States for that year. (See quotation in Note 2 below.)

(c) Condition No. 4 does not relate to the bank's qualifications for membership at the time of the application, nor does a subsequent breach of the condition work a legal defeasance of membership.

The record (R. 4) shows that plaintiff bank was found eligible by the Board and admitted to membership; it also shows that the Board still regards it as eligible (R. 11).

There was no question as to the general character of the bank's management, as to its capital structure, its prospects for success, the convenience and needs of the

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[2]Page 43, Annual Report of Federal Reserve Board for 1927:

"**Conditions of membership which may be imposed on State member banks.**—The first paragraph of section 9 of the Federal reserve act was amended by the McFadden Act so as to require that the conditions imposed by the Federal Reserve Board upon State banks admitted to membership in the Federal reserve system shall be pursuant to the Federal reserve act."

community or as to its purpose to conduct a legitimate banking business. It met every legal test of eligibility. Affirmative findings on these factors resulted in the admission of the bank to the System. Thereafter it was incumbent on the bank to conduct its operations in accordance with all regulations and according to law and to avoid unsafe and unsound practices in the tranaction of its banking business. The statutes on this subject are clear and unambiguous. For the failure of the bank to conduct its business according to law its officers may be penalized (Section 30, Banking Act of 1933, 12 U.S.C. §77, Statutory App. pp. A-1, A-2); for continuation of unsafe and unsound practices the bank's insurance may be terminated, which will result in the termination also of its membership in the Federal Reserve System (Federal Reserve Act, §12B, subsection (i)(2), Statutory App. pp. A-6, A-7), and for failure to comply with regulations made pursuant to Section 9 of the Federal Reserve Act the bank's membership is subject to forfeiture under paragraph 8 of Section 9 of the Act, as amended (12 U.S.C. §327, Petition p. 21, Statutory App. p. A-3). If the bank knowingly or negligently permits its officers to violate provisions of law or regulations its insurance can be terminated (Fed. Res. Act §12B (i)(1); 12 U.S.C. §264 (i)(1); Statutory App. pp. A-4, A-5); but if the officers alone are involved, it is the statutory policy to remove them rather than to remove the bank from the System (12 U.S.C. §77, Statutory App. pp. A-1, A-2). There is no statute under which the membership of a presently qualified and eligible bank may be so conditioned

against future contingencies as to involve the bank in penalties different from and inconsistent with those expressed in the statutes. On the other hand, the Federal Reserve Act affirmatively and expressly recognizes that all banks shall be permitted to "obtain and enjoy" the benefits of deposit insurance without discrimination (Sec. 12B (y)(2); 12 U.S.C. §264 (y); Statutory Appendix p. A-3), from which it follows that a state bank cannot be expelled and thereby lose the benefit of insurance upon a ground that is not equally applicable to national banks. For obvious reasons the membership of a national bank could not be so conditioned. A condition prescribing such a forfeiture for a state bank is therefore not imposed pursuant to the act, but contrary to it.

The Court of Appeals in that part of its opinion beginning at the middle of page 128 of the record, and more specifically at the middle of page 129, basing its discussion on contentions and actions of the Board with respect to the operation of the Condition, goes to some length to harmonize the legal effect of what it deems to be the administrative interpretation of the Condition by the Board with the disciplinary statutes, thus giving to it all the effect that can be ascribed legally, while making clear that it cannot be legally operative throughout the scope of its broad declaration. The effect of the decision, therefore, is to leave the Board free to exercise with respect to the plaintiff bank all of its statutory disciplinary powers.

Clearly, if the Condition were interpreted as giving the Board the power to compel the withdrawal of

Peoples Bank from the Federal Reserve System merely because of the acquisition of stock (even one share) by Transamerica Corporation, the Condition would be invalid as being in excess of the powers delegated to the Board by the statute.

It is a well established principle that where an administrative agency has exceeded the powers given to it by law, such action will be restrained by the courts. As this Court said in *Manhattan General Equipment Company v. Commissioner,* 297 U. S. 129, at p. 134:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Produce Co.,* 265 U. S. 315, 320-322; *Miller v. United States,* 294 U. S. 435, 439-440, and cases cited."

See also:

Waite v. Macy, 246 U. S. 606;
Morrill v. Jones, 106 U. S. 466;
International Railway Co. v. Davidson, 257 U. S. 506;
Campbell v. Galeno Chemical Co., 281 U. S. 599;
The State of Colorado v. Toll, 268 U. S. 228;
Miller v. U. S., 294 U. S. 435;

Vom Baur, Federal Administrative Law (1942 Ed.), Vol. 1, §499;
Lynch v. Tilden Produce Co., 265 U. S. 315;
Koshland v. Helvering, 298 U. S. 441.

(d) The subject matter of this condition is currently a matter of legislative consideration under formal recommendations of the Board pointing to the inadequacy of the existing law to achieve the Board's objectives, and is not as yet crystallized in legislative enactment. (See S. 829, 80th Congress, First Session, and reports of current hearings thereon.) This may well result in a decision which would be of little or no value under new legislation. In a statement of Chairman Eccles before the Senate Banking and Currency Committee on S. 829, made and released on May 26, 1947 and which was published at large on the following day (see page C 37, New York Times for Tuesday, May 27, 1947) is the following, quoted verbatim:

> "In order to establish branches, national banks must first obtain permission from the Comptroller of the Currency, State member banks from the Board and non-member insured banks from the FDIC. But the bank holding company is not subject to any such requirements. If a bank in its group is denied the right to establish an additional office, *there is nothing to prevent it from acquiring the stock of an existing bank* and simply adding the institution to its list of controlled banks, operating it, for all practical purposes, as a branch of the entire system." (Italics ours.)

The bill has been favorably reported to the Senate.

3. ADDITIONAL REASONS ADVANCED BY PETITIONERS STATE NO GROUNDS FOR REVIEW.

The suggestion advanced by the petitioners as to other valid purposes for the Board's action in imposing the Condition (Petition, p. 10) which are grounded upon a reference to the Clayton Act can impart no validity to the Condition nor supply any reason for review, for:

(a) Administrative proceedings for the enforcement of the Clayton Act are specifically prescribed in that act (15 U.S.C. §21, Statutory App. pp. A-8 to A-11) and the method of administrative enforcement is entirely foreign to that prescribed for the enforcement of valid conditions under the Federal Reserve Act.

(b) The Condition itself is more comprehensive and restrictive than compliance with the Clayton Act requires for the Condition would apply even to a purchase of a few shares as an investment (expressly excepted under 15 U.S.C. §18, Statutory App. A-7, A-8).

(c) The enforcement of the Clayton Act requires a cease and desist order enforceable only in the Court of Appeals (15 U. S. C. §21, *supra*); that act carries its own penalties and does not authorize expulsion of a bank from the Federal Reserve System for an offense committed by some other person.

(d) Even if it were conceded *arguendo* that the principle or policy of the Clayton Act is impliedly involved in the Condition, it would follow as a nec-

essary legal conclusion that the Condition is invalid because it is not imposed "pursuant" to the Federal Reserve Act but pursuant to a different statute and involves acts entailing discipline altogether different from that applicable to breaches of conditions of membership. Membership is forfeited under Paragraph 8 of Section 9 of the Federal Reserve Act (12 U. S. C. §327, Petition, p. 21) only for non-compliance with the provisions of that "section" or the regulations made pursuant to it. *Besides, whatever jurisdiction the Board has to enforce the Clayton Act exists irrespective of the Reserve Act or of this Condition and is equally applicable to all banks or companies affected, regardless of any prior stipulations, conditions or agreements and it is not affected by the judgment in this case.*

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4. **THE SECOND AND THIRD QUESTIONS PRESENTED BY PETITIONERS STATE NO GROUNDS FOR REVIEW.**

(a) The second question presented by the petitioners is whether the respondent is "estopped" from challenging the validity of the Condition.

No reasons are presented in the petition which point to the appropriateness of a review by this Court of that part of the decision of the Court of Appeals holding that the doctrine of estoppel is not applicable. This question is apparently but incidental to the first and principal question. The court below pointed out that the respondent is not attacking the validity of any statute and said (R. 131):

> "No administrative body has authority to contract with a regulated corporation in a manner contrary to the statute which is being administered, nor in a way which does not give effect to the intent of Congress. The regulated corporation, by accepting such an invalid condition imposed by a regulatory authority, does not thereby waive the right to rely on the statute, and the right later to denounce the provision which contravenes it."

Obviously, any other conclusion would operate practically to expand the powers of the regulatory body beyond those which are conferred by law. Any regulated corporation such as a bank is entitled to the advantages of membership in federally established and administered agencies on terms of equality with every other corporation. Any attempt to bind any individual corporation through the imposition of unauthorized conditions on the theory that their acceptance will estop the corporation to question them would bring about inequalities which the statutes are designed to prevent. In addition, estoppels result from equitable considerations and equity naturally frowns on inequality.

There is nothing in the decision of the Court of Appeals touching the doctrine of estoppel which warrants review within the principles generally understood to control in the granting of writs of certiorari.

(b) The third question presented is whether the District Court had jurisdiction to entertain an action for declaratory judgment in advance of any steps

being taken by the Board actually to enforce the Condition.

The negative response to this question desired by the petitioners would destroy any real usefulness of the remedy of declaratory judgment. The exact question was thoroughly considered upon a separate motion made before the Honorable Alexander Holtzoff of the District Court of the District of Columbia seeking dismissal for lack of a justiciable controversy. The contention was fully argued and briefs were submitted by both parties. Thereafter Justice Holtzoff, in an exhaustive and carefully considered opinion reported in 64 F. Supp. 811, denied the motion. The majority opinion in the Court of Appeals stated on this point: "We need not elaborate upon the opinion of the learned justice of the District Court * * *".

The authorities bearing upon the question were carefully analyzed and considered in Justice Holtzoff's opinion. The philosophy of the opinion is perhaps best reflected in the quotations which were made from the opinion of Mr. Justice Douglas in *Altvater v. Freeman,* 319 U. S. 359, 365, to the effect that "It was the function of the Declaratory Judgments Act to afford relief against such peril and insecurity." Justice Holtzoff concluded (64 F. Supp. at p. 816): "To say that no actual controversy exists between the parties is not realistic."

It is doubtful that any opinion has been written dealing with the single question of the existence of a justiciable controversy in an action for declaratory judgment that reflects more sound reasoning and that

reaches a conclusion more in accord with the language and spirit of the statute. Certainly the petitioners have presented no ground for the granting of certiorari to reverse the decision of Justice Holtzoff under the facts presented on this record, and it is inconceivable that the petition would be granted for the purpose of effecting such a review.

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5. THERE EXISTS NO "ADMINISTRATIVE REMEDY".

Under the third question presented by the petitioners it seems to be contended,—a claim made in this Court for the first time in this case—that the action was premature because of the so-called failure of the respondent "to exhaust its administrative remedy." It seems to the respondent, as it evidently appeared to Justice Holtzoff, that the Condition was so drawn that there exists no administrative remedy. Under the Condition the only question remaining for determination by the Board is whether or not Transamerica Corporation purchased shares in the respondent bank without the prior approval of the Board. This fact is alleged in the complaint. It is not denied and it is, of course, conceded. The only possible administrative remedy if the Condition be invalid is an application to the Board for its cancellation. The record (R. 7) shows that this application was made before this proceeding was begun and that the petitioners had failed to comply with the respondent's request. Since the undisputed facts then show that the Board insists upon retaining a claimed right sum-

marily to terminate the membership of respondent bank, wholly aside from any question of the legality of its operations and its stability or soundness, the question of administrative remedy is not in the case.

SUMMARY AND CONCLUSION.

There is nothing in the decision below which warrants review by this Court. A drastically restrictive and unique condition of Federal Reserve membership has been imposed upon a small California bank. No other bank anywhere has ever been subjected to such a restriction. The bank in question, after seeking administrative relief in vain, has been forced to the trouble and expense of coming to the District of Columbia to sue. The administrative agency in its effort to defeat the suit has represented to the Court below that its intention, if not its words, was to act only within the limits permitted by the statute. The Court below, relying upon the good faith of the agency, has not given injunctive relief, but, as a minimum protection to the bank, has declared the rights of the parties in accordance with the statute and in conformity with other decisions of this Court, ——a declaration wholly consistent with the agency's representation of its intention. That result is satisfactory to the bank. The agency, simultaneously with its petition to this Court to review that decision, has also asked the Congress to give it a new legislative grant of authority which both the agency and the Court below have said it does not now have. If the

Congress should grant the authority requested, this case would immediately become moot. In such circumstances it is difficult to see what useful purpose would be served by granting certiorari.

THE PETITION SHOULD BE DENIED.

Dated, June 30, 1947.

Respectfully submitted,

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(Appendix Follows.)

Statutory Appendix

Excerpts from Banking Act of 1933 relating to penalties for "Unsafe or Unsound Practices" in business of a State Member Bank.

(As set forth in United States Code, Title 12.)

12 U.S.C. §77. Removal of director or officer.

"Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal

Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided,* That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the Court. June 16, 1933, c. 89, §30, 48 Stat. 193; Aug. 23, 1935, c. 614, §203(a), 49 Stat. 704."

Excerpts from Federal Deposit Insurance Provisions of Federal Reserve Act.

(As set forth in United States Code, Title 12.)

12 U.S.C. §264. Federal Deposit Insurance Corporation—Creation; duties.

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"(y.) It is not the purpose of this section to discriminate, in any manner, against State nonmember, and in favor of, national or member banks; but *the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section.* No bank shall be discriminated against because its capital stock is less than the amount required for eligibility for admission into the Federal Reserve System." (Italics ours).

Federal Reserve Act, Sec. 9, par. 8.—Forfeiture of Membership. (United States Code, Title 12, §327.)

If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the Board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Federal Reserve Act, Sec. 12B, subsection (i).—(Federal Deposit Insurance Provisions.) (United States Code, Title 12, §264(i).)

(i) (1) Any insured bank (except a national member bank or State member bank) may, upon not less than ninety days' written notice to the Corporation, and to the Reconstruction Finance Corporation if it owns or holds as pledgee any preferred stock, capital notes, or debentures of such bank, terminate its status as an insured bank. *Whenever the board of directors shall find that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of such bank, or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, the board of directors shall first give the Comptroller of the Currency in the case of a national bank or a District bank, to the authority having supervision of the bank in the case of a State bank, or to the Board of Governors of the Federal Reserve System in the case of a State member bank, a statement with respect to such practices or violations for the purpose of securing the correction thereof.* Unless such correction shall be made within one hundred and twenty days or such shorter period of time as the Comptroller of the Currency, the State authority, or Board of Governors of the Federal Reserve System, as the case may be, shall require, the board of directors, if it shall determine to proceed further, shall give to the bank not less than thirty days' written notice of intention to terminate the status of the bank as an

insured bank, and shall fix a time and place for a hearing before the board of directors or before a person designated by it to conduct such hearing, at which evidence may be produced, and upon such evidence the board of directors shall make written findings which shall be conclusive. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured bank. *If the board of directors shall find that any violation specified in such notice has been established, the board of directors may order that the insured status of the bank be terminated on a date subsequent to such finding and to the expiration of the time specified in such notice of intention.* The Corporation may publish notice of such termination and the bank shall give notice of such termination to each of its depositors at his last address of record on the books of the bank, in such manner and at such time as the board of directors may find to be necessary and may order for the protection of depositors. After the termination of the insured status of any bank under the provisions of this paragraph, the insured deposits of each depositor in the bank on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of two years to be insured, and the bank shall continue to pay to the Corporation assessments as in the case of an insured bank during such period. No additions to any such deposits and no new deposits in such bank made after the date of such termination

shall be insured by the Corporation, and the bank shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such bank shall, in all other respects, be subject to the duties and obligations of an insured bank for the period of two years from the date of such termination, and in the event that such bank shall be closed on account of inability to meet the demands of its depositors within such period of two years, the Corporation shall have the same powers and rights with respect to such bank as in case of an insured bank.

(2) *Whenever the insured status of a State member bank shall be terminated by action of the board of directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of section 9 of this Act,* and whenever the insured status of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation whenever the bank shall be unable to meet the demands of its depositors. *Whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured bank shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System,* with like effect as if its insured status had been terminated on

said date by the board of directors after proceedings under paragraph (1) of this subsection. (Italics ours.)

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Excerpts from Clayton Act.
(As set forth in United States Code, Title 15.)

§ 18. Acquisition by one corporation of stock of another.

No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about,

or in attempting to bring about, the substantial lessening of competition.

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§21. Enforcement provisions; procedure.

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to common carriers subject to chapters 1 and 8 of Title 49; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to chapter 9 of Title 49; *in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies;* and in the Federal Trade Commission, where applicable to all other character of commerce, *to be exercised as follows*:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said sections, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or

board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order *requiring such person to cease and desist from such violations and divest itself of the stock held* or *rid itself of the directors chosen contrary to the provisions of sections 18 and 19* of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is

being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such trancript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such

additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in sections 346 and 347 of Title 28.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust laws. (Italics ours.)

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